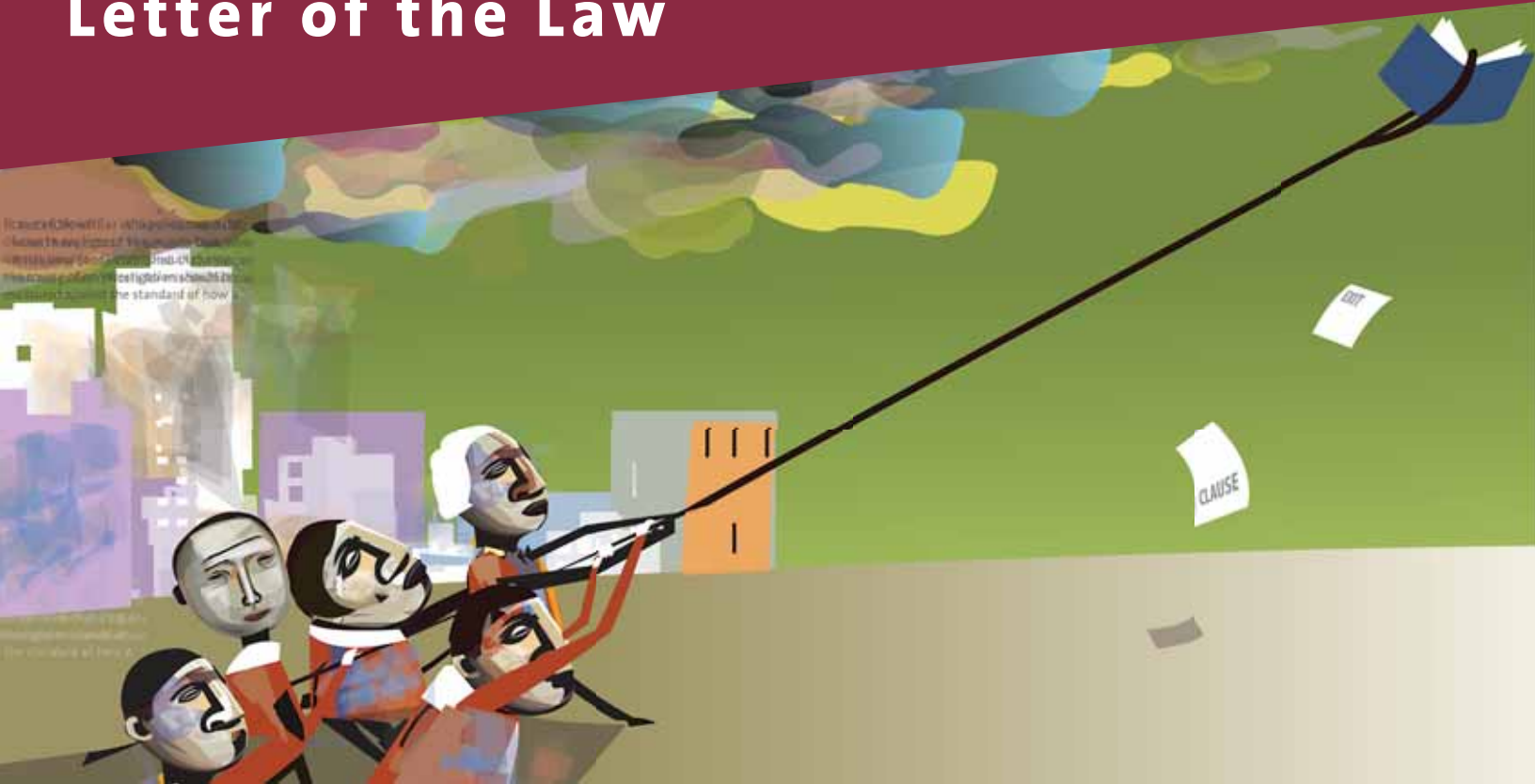


Letter of the Law



Supreme Court of Canada Holds Liability Exclusion in Tender Documents Ineffective

On February 12, 2010, the Supreme Court of Canada rendered its much anticipated decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, a judgment that could have far-reaching implications for public procurement in the future. The central issue in the appeal was whether the Province of British Columbia could, by including in its tender documents a broad “exclusion of liability” clause, immunize itself from claims by an unsuccessful tenderer.

The tenderer, Tercon Contractors, claimed that the Province breached its duties when it awarded a contract to an ineligible bidder. In the result, the Supreme Court found itself deeply divided. Five justices allowed Tercon’s claim and four would not have. While all nine justices agreed upon the legal approach to interpreting contractual liability exclusion and limitation provisions, the thin majority determined that the facts in *Tercon* fell outside the scope of those provisions while the dissenting justices disagreed.

The facts of the case were straightforward. Following responses to a request for expression of interest (RFEI) for the design and construction of a highway, the Province issued a request for proposals (RFP). Under the RFP terms, only the six proponents who had responded to the RFEI were eligible to submit a proposal—those received from any other party would not be considered. One of the six proponents entered into a pre-bidding agreement with another, non-qualified, company and tendered a proposal as a joint venture.

The arrangement allowed that proponent to prepare a more competitive proposal than it would have been able to had it bid alone. Its proposal was submitted in its own name with the unqualified joint venturer listed as a “major member” of the proponent’s team. The Province chose to ignore the fact that the joint-venture proponent was ineligible and awarded it the contract. Otherwise Tercon would have received the award.

Tercon sued the Province for breach of its bid contract. In its defence the Province relied upon a liability exclusion clause contained in the tender documents which stated that: “No Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.” These types of terms are commonly found in tender documents and are intended to protect the owner from claims by unhappy tenderers.

Tercon won its case initially at trial in B.C. Supreme Court but the B.C. Court of Appeal allowed an appeal by the Province, giving full effect to the liability exclusion

(Continues on page 2)

ILLUSTRATION John Belisle, Signals

(Continued from page 1)

clause. Tercon then appealed to the Supreme Court of Canada.

While disagreeing in the result, all members of the Supreme Court of Canada concurred on the approach to be applied when a party seeks to escape the effect of an exclusion clause to which it has contractually agreed. The first step involves a matter of interpretation—to determine whether the exclusion clause pertains to the circumstances of the case. This will depend on a court’s understanding of the intention of the parties as expressed in the contract.

If it does pertain, the second step is to decide whether the clause was unconscionable—and thus invalid—at the time the contract was made. Whether there was an inequality of “bargaining power” and a lack of sophistication in one party may be considered. Where an exclusion clause is found to be valid at the time the contract was formed, a court will undertake a third step—to decide whether it should refuse to enforce the exclusion clause because of some overriding public policy.

The burden of persuasion at this last stage lies on the party seeking to avoid enforcement of the clause; it must demonstrate that there has been an abuse of the freedom of contract which outweighs the very strong public interest in its enforcement. Serious criminality or egregious fraud by the owner are examples of situations in which public policy considerations may result in a court refusing to give effect to a liability exclusion clause.

The majority of the Supreme Court of Canada held that the Province had breached the express provisions of Tercon’s

bid contract by accepting a tender from a party that should not have been permitted to participate in the tender process. The Court held that the Province’s “egregious” conduct breached the implied duty of fairness it owed to all proponents. The majority characterized the conduct of the Province as an “affront to the integrity and business efficacy of the tendering process.” The exclusion clause, which barred claims for compensation “as a result of participating” in the tendering process, did not, when properly interpreted, exclude Tercon’s claim for damages, according to the majority of the Court.

The majority reasoned that the closed list of bidders (limited to those that had qualified through the RFEI) was the foundation of the RFP and the parties could not have intended that the exclusion clause waived compensation claims for conduct that struck at the very heart of the tendering process. The fundamental requirement of the RFP (that only compliant bids be considered) and the implied obligation to treat bidders fairly had been breached by the Province.

The four members of the Court, who dissented in the result and would have upheld the B.C. Court of Appeal’s decision to dismiss Tercon’s appeal, interpreted the exclusion clause as applying to the facts. They considered the conduct of the Province as not so egregious as to prevent the clause from being given effect. A sharp philosophical division relating to contractual freedom underlies this judicial split.

What does this decision mean for owners, tendering authorities, procurement docu-

ment drafters, and tenderers? In a nutshell, if owners and tendering authorities seek to limit or exclude liability for breaches of the procurement rules, they must draft the tender documents extremely carefully. The courts will now be increasingly more reluctant to interpret these clauses for the benefit of the contract breaker. *Even the majority in this case recognized that, if the language of an exclusion clause is sufficiently clear, a court can give effect to liability exclusion clauses which exclude claims arising out of an owner’s failure to award only to compliant bidders or a breach of the owner’s implied obligation of good faith in the tendering process.*

Ultimately, an owner’s ability to legally immunize itself from legal claims arising out of its own breach of a bid contract or duty owed to tenderers will largely depend on the language of the liability limitation or exclusion clauses that it unilaterally incorporates in the procurement documents. To fully understand their rights and responsibilities, owners and tenderers alike will now want to clearly focus on the drafting of such clauses. Existing procurement documents should be reviewed for conformity with the new approach arising out of the *Tercon* decision. **SU**

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EDITOR’S NOTE

SU has had a long and productive relationship with the University of British Columbia’s law school. Partners in our firm currently teach two law school courses—on construction law and alternative dispute resolution—and many alumni of that school are associates and partners at our firm.

Articling students from UBC tell me that SU is a prime choice for articles as our firm has a reputation for providing

challenging and rewarding training in law, not to mention a stellar track record in subsequently hiring those students as associates. Members of our firm have assisted in UBC moot courts and environmental mediation moots. We also support the dispute resolution clinic.

For these and many other reasons, SU is very pleased to contribute to the building fund for the new law school facility which exemplifies both our history of support and our ongoing strong relationship.

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Some Peculiarities of Strata Property Insurance

INSURANCE LAW

For several reasons, insuring a strata property is considerably different from insuring a house. The owner of a single-family dwelling, for example, is responsible for insuring the entire property. But within a condominium building, the responsibility is divided between the strata corporation and the individual owners of each unit. Under the *Strata Property Act*, the corporation insures the common property owned and used by all strata owners as well as certain interests of each strata owner. Strata owners are responsible for insuring other exposures, including liability, fire and theft, within their individual properties.

Strata corporations, according to the Act and its accompanying Regulations, are required to obtain full replacement-value property insurance against loss resulting from fire, lightning, smoke, windstorm, hail, explosion, water escape, strikes, riots or civil commotion, impact by aircraft and vehicles, vandalism and malicious acts, on:

- common property
- common assets
- buildings shown on the strata plan
- fixtures built or installed on a strata lot (if the fixtures are built or installed by the owner-developer as part of the original construction on the strata lot).

Fixtures include items attached to a building, such as floor coverings, electrical wiring, and plumbing, but not household appliances.

Owners insure any gaps or shortfalls in the above coverage as well as personal property within their strata unit—anything, in fact, that does not fall within the ambit of common property. For example, an owner may want to take out earthquake coverage or supplement the limits of the corporation's policy. (The latter instance is an extra precaution for a strata owner. While a strata corporation must maintain full replacement-value insurance on property, the full replacement value of the property is determined in accordance with the market price of the property at the beginning of the policy year. If the market rises sharply over the policy year, the value of the insured property when a loss occurs may have

increased considerably since the time when the coverage began. This circumstance creates a shortfall in coverage, adversely affecting individual strata owners.)

Loss assessment coverage and contingent insurance coverage are two types of insurance particular to strata properties. The first covers assessments made by the corporation resulting from damage to the strata common property caused by an insured peril. This occurs when a corporation's insurance does not cover an entire loss or if coverage is excluded (for damage arising from an earthquake, for example). In such instances, a corporation levies an assessment on the individual owners to repair the common property and the assessment coverage is triggered.

Another occasion when this insurance may apply is when a particular strata unit owner accidentally damages common property. Many strata corporation bylaws include a provision that the corporation can compel an owner who is responsible for such damage to pay the deductible amount. The assessment coverage clause in a policy may cover an assessment in such a case, unless expressly excluded in the policy.

Contingent insurance covers loss to an individual strata unit, caused by an insured peril, to which the corporation's insurance does not apply. Again, it may be possible to interpret the term "loss"—as used in contingent insurance clauses—to encompass financial loss arising from an owner's share of an assessment. However, principles of insurance policy interpretation dictate that insurance policies must first be interpreted by form and second as an entire policy, so that all the clauses make sense as a whole.

Given those principles, where both assessment and contingent insurance coverages are included in one policy, providing coverage for a strata-wide assessment under contingent insurance would be redundant since assessment coverage expressly covers this risk. If contingent insurance was intended to cover assessments as well as damage to a strata owner's unit, assessment coverage would be obsolete.

If, however, the policy wording only mentions contingent insurance, and not assess-



ment coverage, it is prudent to expressly address the underwriter's intention regarding the scope of the contingent insurance. Without such clarification, a court is more likely to find that contingent insurance would also cover strata corporation assessments.

As the limit for contingent insurance is ordinarily much greater than the assessment coverage limit, careful attention to the wording of these clauses and the particular characteristics of strata property insurance is crucial. **SU**

For more information on strata corporation and strata owner insurance, please contact



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Public Private Partnerships: A Paradigm Shift



In many parts of the world, public private partnerships (P3's) are fast becoming the preferred way for building and delivering major infrastructure projects. P3 has been a process for project delivery in the United Kingdom under the guidance of Partnerships UK (PUK) for more than a decade: more than 900 P3 projects worth over UK£70 billion have been procured in that time.

Closer to home, Partnerships British Columbia (PBC) has been responsible for managing over 20 P3 projects. More are on the way and PBC is assisting other provinces with managing this process.

The P3 concept has been widely endorsed and employed in Ontario and, more recently, in Saskatchewan and Alberta. In the United States, considerable interest has been shown in P3 projects for rebuilding that country's infrastructure, with some states having already enacted legislation endorsing the P3 structure as an acceptable way of spending the public purse.

What is it about P3's that makes them so attractive? The answer is multifold and includes not only a track record of successfully concluded projects with demonstrated financial advantages over the standard "design-bid-build" (DBB) format but also the effectiveness and fairness of the P3 procurement process itself.

At the root of the P3 model is the principle that, in awarding public sector projects, the taxpayer's best interests are realized when

the award is made on the combined basis of the lowest cost proposal bringing the "best value" to the public sector sponsor. *The lowest price does not necessarily govern, as happened historically with public construction projects following the DBB model.* Now, close attention is paid to the "real value" the public receives from the projects being designed and built. And the process of assessing "best value" brings to light the real advantages of the P3 process.

In estimating "best value" in the P3 format, a project's sponsors consider several factors, including:

- the experience and skill of the designers, builders and facility managers involved on the project
- the functionality, efficiency and serviceability of each proponent's proposed design
- the degree of risk available for transfer from the public sector to the private sector

- the advantages of proposed debt and equity financing solutions.

Uniquely, an evaluation gauges the certainty of the project achieving a 25-30 year lifespan free of any untoward increase in facilities management and maintenance costs, a feature which goes largely unnoticed in the DBB process. In short, assessing "best value" enables the public sector to define, with a considerable degree of accuracy, the total cost of the project for its entire life cycle and to transfer to the private sector the risk associated with successfully achieving that life cycle.

The next question is: how are these significant benefits achieved in the P3 procurement process? Recognize first that the process is radically different from that used in the standard DBB format. Before any proposals are invited for the design and construction of a P3 project, construction teams or "proponents" qualified to undertake the project are identified. This is done by issuing a Request for Qualifications (RFQ) inviting the industry to respond to a detailed RFQ that sets out a team's background in design, construction, maintenance and financing of similar projects.

The proponents are provided with a description of the public sector's "needs" for the project and various other details that enable them to determine whether they have the requisite skill and experience to respond. A team of qualified evaluators then subjects the responses received to a detailed evaluation. All these procedures take place under the watchful eye of a "fairness monitor" or "independent observer" to ensure that the process is fair, robust and transparent.

In the standard DBB process, by comparison, there is usually no such evaluation made before the submission of formal bids or tenders; nor is there an opportunity to test the suitability of any particular bidder or proponent before the formal bidding process.

Once the project's sponsor and the evaluation team have identified a short list of qualified P3 teams or proponents, each is invited to submit a comprehensive proposal for the design, construction, management and financing of the project. The Request for Proposals (RFP) issued at this stage of the process provides a very

detailed description (including a copy of the final project agreement being proposed by the public sector sponsor) of what each proponent should take into account in making its submission and the basis upon which each proposal will be evaluated.

The proponents are free to make suggested changes to the project agreement and to be as innovative as they wish in their proposed design, financing, construction and management of the project. When the sponsor receives the proposals, they are again put through a detailed evaluation process that includes presentations by each proponent, collaborative meetings, and comprehensive analyses conducted by committees comprised of expertise in each of the four aspects of the proposals. As before, the entire process is under the watchful eye of an independent fairness monitor.

The degree of evaluation undertaken in the procurement process for P3's, at both the RFQ and RFP stages, is missing from the standard DBB methodology. The advantage to the P3 evaluation process is that it is more likely to ensure that any given project will meet the public sector's long-term needs. It will also more probably establish

an amicable and successful working relationship between the public sector agency and the winning "design-build-finance-maintain" team than other project delivery methods. In short, there is a much greater likelihood that the taxpayer will get "best value" for each tax dollar. The experience of

... close attention is paid to the "real value" the public receives from the projects being designed and built.

PUK in the United Kingdom, PBC in Canada and British Columbia, Infrastructure Ontario, and similar organizations in the United States is proving this to be the case.

The presence of an independent fairness monitor throughout the P3 procurement process is an important feature of this form of procurement. It is much less likely that an unsuccessful proponent would challenge the award of the project to the proponent bringing the "best value" to the project. To demonstrate the usefulness of

a fairness monitor, one need only look at the rows of legal cases involving tendering disputes along the walls of law libraries. None involved the concept of fairness monitoring. Had they done so, many, if not all, of those library shelves would be empty.

Public private partnerships and the accompanying use of fairness monitoring represent a paradigm shift in the allocation and management of the public purse. Although, as with all advances in the manner in which we do things, the process has its doubters, the record to date gives every indication that these concepts have much to offer the public sector (and perhaps the private sector) in delivering on-schedule, on-budget, economically successful, construction projects. **SU**

For more information on public private partnerships and construction law in general, please contact



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Mr. Singleton has acted as a fairness monitor on a number of P3 public infrastructure projects.

US@SU

SU is the proud sponsor of the Spring 2010 CoRe Clinic Speaker Series. CoRe Conflict Resolution Society is a registered charity operating out of the Faculty of Law at the University of British Columbia that offers low-cost mediation services to the community. The CoRe Clinic Speaker Series provides a forum for the legal profession, mediators and law students to engage in the discussion of important and emerging issues in conflict resolution.

SU welcomes back former Associate **GURPRIT GILL**. Gurprit first joined **SU** in 2001 after completing her Bachelor of Laws at the University of British Columbia. Her primary areas of practice were insurance defence (including ICBC fraud recovery actions), coverage opinions for CGL policies, and creditors' remedies. In 2005, Gurprit joined the Law Society of British Columbia's Regulatory Department where she investigated allegations of serious misconduct.

MICHAEL HEWITT gave a presentation to the Vancouver chapter of the Association of Certified Fraud Examiners on "The New Tort of Negligent Investigation" in January.

JEFF HAND and **BARBARA CORNISH** are teaching "Mediation Advocacy" this spring at the University of British Columbia Law School.

JOHN SINGLETON, Q.C. is teaching a construction law class at Stanford University in California. Topics covered include project structures, procurement, insurance in the construction industry, responsibility of owners/consultants, and responsibility of builders and building regulators.

GLENN URQUHART, Q.C. has been named "Vancouver's Best Lawyers Construction Lawyer of the Year" for 2010.

SU is a proud supporter of the UBC Faculty of Law Building Fund. The firm has a long-standing history of giving to the Law School and is pleased to donate \$100,000 towards building a new facility. The Singleton Urquhart Group Study Room will be surrounded by larger classrooms and moot court space, functional research space, and a state-of-the-art law library.



An artist's rendering of the new UBC Law School. Image kindly provided by UBC.

Seminar Announcement

The Singleton Urquhart LLP Employment Law Group will be presenting a seminar on "Developments in Employment Contracts, Web 2.0 Policies, and Human Rights" on June 17, 2010. To register, please visit: www.singleton.com/Our_Events.aspx

Independent, Dependent or Employee — How Would You Describe Your Contractor?

EMPLOYMENT LAW | *Marbry Distributors Ltd. v. Avrecaan International Inc.*; *McKee v. Reid's Heritage Homes Ltd.*

In 1999 the British Columbia Court of Appeal released a seminal decision in *Marbry Distributors Ltd. v. Avrecaan International Inc.* The Court was asked in this case to determine if Gordon Marbry, a small-business owner and a contractor, was entitled to reasonable notice for the termination of his company's long-standing relationship with Avrecaan, a national distributor of sporting goods.

The Court in *Marbry* was not asked to determine if Mr. Marbry was an employee—there was no question that he was not. It was, however, asked to determine if the nature of the relationship between Marbry and Avrecaan went beyond that of an “independent contractor situation” and, if so, what that meant. The Court specifically examined the economic ties between Marbry's company and Avrecaan to determine if those ties imposed a liability on Avrecaan to provide more than one month's notice of the relationship's conclusion.

Ultimately, the Court held that this relationship was, in certain respects, “more akin to employee/employer than that of independent contractor or strict agency”; finding, among other reasons, that the relationship was characterized by a large degree of financial and economic dependence. This ruling opened the door in British Columbia to an intermediate category of relationship between a business and those it pays to work on its behalf. The Court found that, as Mr. Marbry was neither an employee nor an independent contractor, he and his wholly-owned company represented a third category—the dependent contractor.

The importance of the *Marbry* decision, and the identification and definition of this intermediate category, should not be underestimated. In circumstances where a dependent-contractor relationship is found to exist, the contractor, while not entitled to all of the benefits of employment, will at least be entitled to reasonable notice, or pay in lieu thereof, if the relationship is summarily terminated. The Court awarded Mr. Marbry nine months' notice instead of the one month that Avrecaan had offered.

Such potential liabilities normally fall well outside of those contemplated by the parties at the inception of a contractor-type relationship. *Marbry* was decided over ten years ago. How, if at all, has the status of the dependent contractor changed in the intervening years? The answer, as given in December 2009 by the Ontario Court of Appeal in *McKee v. Reid's Heritage Homes Ltd.*, is that *Marbry* is still relevant and, in large part, determinative today. The Ontario Court of Appeal reaffirmed the existence and definition of the dependent-contractor relationship.

In *McKee*, the Court was asked to determine whether an individual (and her corporate identity) was a dependent contractor or an employee. Ultimately it held that the plaintiff, Ms. McKee, was an employee but, in the process, it confirmed that there is an intermediate position within the employee to independent contractor spectrum. Mr. Justice MacPherson, in writing for the Court, held:

I conclude that an intermediate category exists, which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as “dependent contractors” and they are owed reasonable notice on termination.

The facts leading to the Ontario Court of Appeal's decision in *McKee* are uncomplicated. Elizabeth McKee first began working with Reid Heritage Homes (RHH) in 1987 as a sales-and-marketing agent, a relationship that continued into early 2005. In 1987 at the inception of the relationship, McKee and RHH entered into a written agreement that contained a termination provision requiring 30-days' notice of termination by either party.

Despite the written agreement, the Court found as a fact that the initial agreement



had concluded shortly after the relationship began and that contractual terms between the two parties had evolved over the 18-year relationship to include:

- the effective elimination of the 30-day termination clause initially contemplated by McKee and RHH
- a tacit agreement between McKee and RHH that McKee would work exclusively for RHH
- RHH's control over key elements of McKee's work, including the tools of her business.

It should be noted that as a result of the third element, the Court ultimately found that McKee was an employee and not a dependent contractor.

The Court in *McKee* confirmed that determining which of the three relationships on the spectrum (employee, dependent contractor or independent contractor) applies in a given circumstance depends heavily on the facts.

These decisions suggest that the key factor in determining the nature of the relationship will be the degree of exclusivity. Evidence that the contractor is in some way economically dependent on the employer may satisfy a court that a dependent-contractor relationship exists. The extent of economic dependency will depend on how complete or near-complete the

relationship between the two parties is. How much of a contractor's income comes from the employer? Does the contractor work for one business exclusively? It is the nature of the relationship that the Court in *McKee* held to be the "hallmark" of the dependent-contractor relationship.

For example, a business may continually hire the same contractor for an extended period of time and enter into a new contract for each new work project. But, depending on the amount of money and time involved as well as any restrictions on the contractor to work for others in the same field, the business may find that it is in an employer/employee or dependent-contractor relationship. The likelihood of a dependent-contractor relationship existing will increase if the contractor has no option except to work solely (or almost solely) for the business.

McKee also serves a warning to employers that a worker can still be a dependent contractor (or, in Elizabeth *McKee's* circumstance, an employee) even when that worker hires, pays and/or manages their own staff. The Ontario Court of Appeal's decision shows that the issue is less about employment than economic ties.

Finally, the *McKee* decision sends another, perhaps more subtle but equally important, warning to employers who create relationships with contractors: reviewing and revising contractor agreements on a regular basis may prevent questions about entitlement or liability on the conclusion of the relationship. With *Marbry's* definition of the dependent-contractor relationship confirmed, businesses, even when they believe they are contracting with an independent contractor, should take extra care to confirm precisely the sort of relationship they have entered into. **SU**

For more information on these cases and employment law in general, please contact



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Debra Rusnak, articulated student, assisted with the research and writing of this article.

Class Dismissed

CLASS ACTION LAW | *Jellema v. American Bullion Minerals Ltd*

In a recent case, *Jellema v. American Bullion Minerals Ltd.*, the Supreme Court of British Columbia refused to certify a shareholder's oppression claim as a class proceeding. The Court instead held that the claim was already representative in nature and that it was therefore precluded from being certified under the B.C. *Class Proceedings Act*.

Mr. Jellema and Mr. Newton were minority shareholders in American Bullion Minerals Ltd. (ABML), a mining company that formerly traded on the TSX Venture Exchange. ABML was petitioned into bankruptcy in 2006 by bcMetals Corporation, which was also ABML's majority shareholder. Mr. Jellema and Mr. Newton then commenced a proceeding in which they said that ABML, bcMetals, and an ABML director took actions which amounted to conduct that was oppressive or unfairly prejudicial to themselves and all other ABML minority shareholders. Some of the behaviour complained of related to the manner in which ABML was petitioned into bankruptcy. Mr. Jellema and Mr. Newton also sought relief on behalf of all minority shareholders, including that all of the minority shares be purchased.

The claim was brought pursuant to the oppression provisions of the B.C. *Business Corporations Act*. Section 227 of that Act provides that a shareholder may apply to a court for relief on the grounds that the affairs of a company have been conducted, or the powers of the directors have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant.

Mr. Jellema and Mr. Newton then applied to have their proceeding certified as a class proceeding under the B.C. *Class Proceedings Act*. Section 41 of that Act, however, says that it does not apply to a proceeding that may be brought in a representative capacity under another Act. In other words, class certification is prohibited if the claim is being brought pursuant to a statute that already allows the claim to be brought on behalf of others.

In the circumstances, the Supreme Court of British Columbia concluded that the wording of the appropriate provisions in the *Business Corporations Act* permitted an oppression proceeding to be commenced

on behalf of many shareholders on a representative basis. It found that Mr. Jellema and Mr. Newton had started such a proceeding and that Section 41 of the *Class Proceedings Act* prohibited class certification of such a claim.

There have not been many cases that have considered Section 41 of the *Class Proceedings Act*. This decision confirms that proceedings seeking relief under a B.C. statute on behalf of a group of persons must be pursued in the manner permitted by the particular statute and not as a class action. **SU**

For more information on the Class Proceedings Act and class action lawsuits, please contact



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John Singleton, Q.C. and Aaron Sherriff acted as counsel for bcMetals and the ABML director in successfully opposing the class certification application in this case.



How the New Rules of Court Will Affect Expert Testimony

THE COURTS

On July 1, 2010, new *Rules of Court* (see *Letter of the Law*, Winter 2009) that are designed to reduce time and money spent on litigation in British Columbia Supreme Court will come into effect. They will provide judges with more authority to control the adversarial process and ensure that the amount of time, expense and process involved in resolving a dispute are proportionate to the dollar amount involved, the importance of the issues in dispute, and the complexity of the proceeding. This authority particularly extends to experts and will affect the firm's clients in two ways: when cases require expert opinions *and* when our professional clients (for example, engineers, accountants and physicians) are hired to give expert opinions for other cases.

court and cannot be an advocate for any party. This duty is akin to an oath to the court and overrides any obligation the expert may have to any party responsible for the expert's fee. Experts cannot simply advocate for the side that hired them; their opinions must not "cross the line" from being neutral and independent.

To ensure that they understand their role, experts must certify that they have prepared their reports in conformity with that duty and that they will testify in compliance with the duty if called upon to give evidence at trial.

A party may still appoint its own expert and parties with the same interest

An expert's reports must meet certain criteria under the new *Rules*: the information contained in the report will include the instructions given to the expert by counsel, details of research by the expert, and a list of all documents the expert relied upon to form the opinion. Experts who testify at trial cannot give any evidence not included in their reports. Similarly, parties are entitled to pretrial review of an expert's working papers and drafts—a provision aimed at reducing advocacy by experts. Drafts reflecting the evolution in an expert's opinion can contain important insights into his or her thinking.

Any party may demand that a joint or court-appointed expert appear at trial for cross-examination; however, only an opposing party may demand the attendance of an expert appointed by another party.

A court will not permit joint experts to give oral evidence unless they are demanded by an opposing party to attend for cross-examination or there are matters that require clarification or explanation. (In such instances, testimony will be limited to those matters.) Further, a party cannot cross-examine its own expert witness.

These rules aim to minimize a trial's length by avoiding unnecessary repetition of expert opinion evidence. Moreover they disallow a party that is unhappy with a joint expert's opinion from circumventing its prior agreement that only one expert may give evidence on a specific issue.

While the new *Rules* take effect on July 1, 2010, there will be a grace period allowing experts to provide opinions under the old *Rules* at trials starting before September 1. Experts already engaged to provide opinions for trials commencing on or after that date should be ready to augment their reports with the required certification and form under the new *Rules*. **SU**

For more information on how the new Rules of Court may impact the experts in your case or how they relate to the duties of litigation experts, please contact



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... the Rules clearly state that an expert has a duty to assist the court and cannot be an advocate for any party.

The main impetus for the *Rules'* changes governing experts is that, in court, experts' opinions are frequently critiqued as advocating for the side that hired them. Or, expressed more abruptly, "experts provide the opinion they are paid to provide." This perception often leads to a "battle of experts" who are hired to counter each other, adding to the complexity of trials and the high cost of litigation. In an attempt to reduce these costs, the new *Rules* address how an expert is appointed and the requirements for expert reports as well as how and when an expert can give evidence at trial.

Most significantly, the *Rules* clearly state that an expert has a duty to assist the

can appoint a joint expert. Opposing parties can also appoint a joint expert. However, the parties must first agree on several criteria, including the issues the expert will address and who will pay the expert. The parties, and the expert, must then sign an agreement reflecting those terms. **Unless a court orders otherwise, the joint expert is the only expert who can give expert evidence on a particular issue.**

Finally, a court may appoint an expert on its own initiative if it considers that an expert opinion may help the court resolve an issue and that expert's report must be tendered as evidence in the trial.